Supreme Court, U.S.
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No. 91-1192

In The

Supreme Court of the United States

October Term, 1991

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

TRANSCONTINENTAL CORPORATION, TRANSNEVA CORPORATION and TRANSNEVA LIMITED PARTNERSHIP,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. SUMMARY OF ARGUMENT

Fed. R. Civ. P. 41(a)(1) permits a party to voluntarily dismiss any claim once on its own initiative without penalty, as long as no answer or motion for summary judgment has been filed by the adverse party. A second dismissal of the same claim, however, is treated as a judgment on the merits. The rule states:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed* in any court of the United States or of any state *an action based on or including the same claim.*

Fed. R. Civ. P. 41(a)(1) (emphasis added). Because the second dismissal is "upon the merits," under the doctrine of res judicata or claim preclusion it operates as a bar to further suits based on the same claim. *Gioia v. Blue Cross Hospital Service, Inc. of Missouri*, 641 F.2d 540 (8th Cir. 1981); *Engelhardt v. Bell & Howell Company*, 299 F.2d 480 (8th Cir. 1962).

Petitioner Lake at Las Vegas Investors, Inc. ("Investors") has attempted to fit this case within the criteria for granting certiorari by manufacturing an illusory split between the circuits as to whether a defendant must demonstrate plaintiff's intent to abuse or harass before obtaining dismissal based on the two-dismissal rule. In this case, the Ninth Circuit held intent irrelevant where the plaintiff has filed two unilateral voluntary dismissals under Rule 41(a)(1). No circuit has held otherwise.

Investors also asserts this case presents the issue of whether state or federal res judicata (claim preclusion) law applies in diversity cases. However, Investors delayed raising that issue until filing its motion to reconsider the Ninth Circuit decision. Since the briefs did not squarely present the issue, the Ninth Circuit did not definitively choose between state and federal law. Moreover, the Ninth Circuit decision is consistent with Nevada state law, as well as federal law.

Similarly, in the district court Transneva Corporation and Transneva Limited Partnership (the "Transneva Defendants") argued claim preclusion did not require mutuality of privity and the Transneva Defendants were in privity with the twice-dismissed Transcontinental Corporation ("Transcontinental") in any event. *Investors failed to contest or argue the point in the district court.* Although Investors argued the privity issue before the Ninth Circuit, the amended opinion filed August 23, 1991, did not decide whether privity existed, because it held Transcontinental and the Transneva Defendants were "substantially the same" for purposes of Rule 41(a)(1).

Investors' failure to properly raise these matters below has left this case with ambiguities and factual issues which render it inappropriate for advancing uniformity of the law.

II. ARGUMENT

A. There Is No Split Among The Circuits Regarding Intent To Harass Under Fed. R. Civ. P. 41(a)(1)

On its face, Rule 41(a)(1) contains no "intent to harass" limitation on the provision which renders a second voluntary dismissal "upon the merits." In this case, Investors filed two voluntary "Notices of Dismissal," one pursuant to Nev. R. Civ. P. 41(a)(1) and one pursuant to Fed. R. Civ. P. 41(a)(1). The Ninth Circuit held intent inconsequential when the plaintiff files two such unilateral voluntary dismissals. *Lake at Las Vegas Investors, Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 727 (9th Cir. 1991) (Pet. App. 13, 22-23).

Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery, 534 F.2d 1012 (2d Cir. 1976) does not hold otherwise. In *Poloron*, the parties first dismissed by stipulation. Although Rule 41(a)(1) contains no distinction between a first dismissal by stipulation or by notice, the court held it would not invoke the rule in the case of a stipulated first dismissal, stating:

> The danger of such abuse [of the unilateral right to dismiss an action] diminishes, however, where the first dismissal is by stipulation. A dismissal by stipulation is not a unilateral act on the part of the plaintiff but rather is a mutual agreement by all the parties.

534 F.2d at 1017. Since this case involved two *unilateral* voluntary dismissals, the Ninth Circuit held the limited exception to the two-dismissal rule recognized in *Poloron* did not apply. No circuit court has grafted an intent to

harass requirement onto the rule in a case involving two unilateral voluntary dismissals.[1] This Court should deny certiorari because no split among the circuits exists on the intent issue in these circumstances.

B. Investors Failed To Properly Raise The Issue Of Whether State Or Federal Claim Preclusion Law Applied In A Diversity Action

Investors now urges this Court to decide whether state or federal claim preclusion law applies in diversity cases. However, Investors did not argue this issue either in the district court or in its briefs before the Ninth Circuit. Investors *first* raised the issue in a Petition for Rehearing and Suggestion for Rehearing En Banc before the Ninth Circuit, filed on May 24, 1991.

In its opinion, the Ninth Circuit did not indicate whether it applied state or federal law on this point (Pet. App. 23-24). Given the dearth of claim preclusion law concerning mutuality of privity and Rule 41(a)(1)

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[1] Although Investors' former counsel filed an affidavit declaring no intent to harass, it was uncontradicted only because the district court never needed to reach the "harassment" issue. Investors' reason for the second dismissal is a matter of record, explained in its motion to amend filed immediately thereafter. Motion to Amend Complaint (Resp. App. 1). Investors dismissed Transcontinental so the real estate transaction between Transcontinental and Pacific Malibu Development Corporation would close. In effect, it induced Transcontinental to close the deal so it could sue Transcontinental. It would be difficult to imagine a less appropriate motive for a voluntary dismissal or a circumstance in which a defendant has suffered more harm by reason of the dismissal.

dismissals, the Ninth Circuit cited a North Carolina state case, *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 380 S.E.2d 163 (1989), in concluding Transcontinental and the Transneva Defendants were "substantially the same" for purposes of Rule 41(a)(1). One cannot tell whether the Ninth Circuit determined the Nevada Supreme Court would likely adopt the "substantially the same" test or whether the court simply applied it as a matter of federal law. Thus, the writ should be denied because there is substantial uncertainty as to what the court below decided, and the issue petitioner seeks to raise might not have made any difference in the result in any case.

Citing *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973), Investors decries the alleged failure to apply state law as if it would lead to a contrary result. Such is not the case. In *Paradise Palms*, the Nevada Supreme Court rejected mutuality of privity as a condition for pleas of prior adjudication, adopting the test first set forth in *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942), and quoting *Bernhard* as follows:

> In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?

505 P.2d at 599. (Emphasis added). The Nevada Supreme Court then concluded:

> [*Bernhard*] is *equally* applicable to the doctrine of collateral estoppel. [Citations omitted.] We approve the *Bernhard* decision for Nevada.

Id. (Emphasis added.) Surely the Ninth Circuit could have concluded the Nevada Supreme Court would not require mutuality of privity for assertion of claim preclusion after having cited with approval *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., supra,* for the proposition that res judicata did not require mutuality of privity.[2] The petition should be denied because it would require the Court to decide this tangential state law issue.

C. Investors Failed To Contest Assertions Of Privity Between Transcontinental And The Transneva Defendants In The District Court

In the district court, the Transneva Defendants asserted privity between them and Transcontinental, and Investors neither contested nor argued the point. In dismissing appellees, the district court observed:

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[2] Investors disingenuously cites *Marine Midland Bank v. Monroe,* 104 Nev. 307, 756 P.2d 1193 (1988) to suggest Nevada requires privity among those asserting claim preclusion. In *Marine Midland,* the court cited *Paradise Palms* with approval, and the case involved an attempt to assert issue preclusion *against* a bank which was neither a party nor in privity with a party to a prior action. In this case, the newly added defendants asserted claim preclusion against Investors, the *plaintiff* in *both* prior actions.

> The Trans defendants allege contractual privity among themselves. Investors fails to contest this argument. Defendants' argument appears to be sound since Transneva Corporation is wholly owned by Transcontinental, and Transneva Corporation is the general partner of Transneva Limited Partnership. Therefore, the *res judicata* argument should apply to all three defendants.

(Pet. App. 30).

Moreover, the Ninth Circuit did *not* ultimately find privity absent between Transcontinental and the Transneva Defendants. Investors first argued Rule 41(a)(1) required mutuality of privity before the Ninth Circuit, but the court found "the argument for a strict privity requirement inapplicable here." In its original opinion, the court stated, "Privity, in its traditional sense, is absent,. . . . " However, the court's order and amended opinion entered on August 23, 1991, deleted the above language because the court concluded the defendants were "substantially the same." (Pet. App. 13). Thus, the Ninth Circuit finally made no definitive determination regarding privity.

Investors argues Nevada law determines the definition of privity in this case, thus presenting another state law issue without fully developed facts and with extremely limited application to the uniformity of federal law among the circuits. The Court should decline this diversion through Nevada law.

III. CONCLUSION

The lack of a genuine split among the circuits in interpretation of Fed. R. Civ. P. 41(a)(1), uncertainty concerning what claim preclusion law the Ninth Circuit applied, and the presence of state law issues that might well make the choice of law issue meaningless, render this case an inappropriate vehicle for establishing the law. The petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAKE AT LAS VEGAS INVESTORS GROUP, INC., a Delaware corporation, Plaintiff, vs. PACIFIC MALIBU DEVELOPMENT CORPORATION, a California corporation; BARRY SILVERTON, an individual; TRANSCONTINENTAL CORPORATION, a California corporation; DOES I-X, inclusive. Defendants.	CASE NO. CV-S-87-768-RDF MOTION TO AMEND COMPLAINT

COMES NOW Plaintiff LAKE AT LAS VEGAS INVESTORS GROUP, INC. ("INVESTORS"), by and through its attorneys of record, Jones, Jones, Close & Brown, Chartered, and hereby moves this Honorable Court for an Order permitting said Plaintiff to amend its Complaint on file herein.

This Motion is based upon Fed. R. Civ. P. 15(a), the following Points and Authorities, and all pleadings and papers on file herein.

DATED this 10th day of November, 1987.

JONES, JONES, CLOSE
& BROWN, CHARTERED

By /s/ Kevin R. Stolworthy
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POINTS AND AUTHORITIES

I.

STATEMENT OF THE FACTS

On October 15, 1987, Plaintiff filed its Complaint in District Court, Clark County, Nevada. On October 16, 1987, Plaintiff filed its Amended Complaint and sued PACIFIC MALIBU DEVELOPMENT CORPORATION ("PACIFIC MALIBU"), a California corporation, and withdrew its suit against Pacific Malibu Development Corporation, a Nevada corporation. On October 22, 1987, Defendant PACIFIC MALIBU petitioned for removal to the United States District Court. Defendant PACIFIC MALIBU'S petition was granted.

Plaintiff INVESTORS now files this Motion to Amend Complaint in order to withdraw all of its causes of action against Transcontinental Corporation and to delete its causes of action of specific performance, declaratory

relief and its request for a temporary restraining order, preliminary injunction and/or permanent injunction against all of the Defendants. Plaintiff seeks to add the causes of action of misrepresentation or negligent misrepresentation against PACIFIC MALIBU and BARRY SILVERTON.

II.

ARGUMENT

Fed. R. Civ. P. 15(a) provides the following:

> Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. (Emphasis supplied)

Professor Moore has noted that amendments are to be very liberally granted under Rule 15(a) stating that:

> *The courts have shown "a strong liberality . . . in allowing amendments under Rule 15(a)."* And in Foman v. Davis the Supreme Court strongly reaffirmed the mandate of Rule 15(a)

that leave to amend shall be "freely given when justice so required."

> Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitate to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed.
>
> * * *
>
> The fact that an amendment involves a departure from the facts previously alleged is no bar to its allowance, since consistence in pleadings is not required.
>
> The Rule applied equally to plaintiffs and defendants and leave to amend may be sought for any purpose relating to the pleadings. The clearest cases for leave to amend are correction of an insufficient claim or defense and amplification of previously alleged claims for defenses.
>
> *Leave may also be sought to add, substitute, or drop parties.* 3 Moore's Federal Practice, ¶ 15.08. (Emphasis supplied)

A noteworthy example showing a strong liberality in allowing amendments under Rule 15(a) is the decision by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), wherein the court held that the trial court should have granted plaintiff's motion to vacate a judgment and amend the complaint because "the amendment would have done no

more than state an alternate theory for recovery." 371 U.S. at 182. The *Foman* court said the following:

> *Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded.* 3 Moore, Federal Practice (2d ed 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – *the leave sought should, as the rules require be "freely given."* (Emphasis supplied) *Id.*

Hence, in light of all these authorities, it is clear that leave to amend pleadings should be readily granted. Accordingly, Plaintiff submits that the instant Motion to Amend the Complaint should be granted by this Court.

The purpose of this amendment is to remove any allegation which would prohibit or restrict the Defendants PACIFIC MALIBU and BARRY SILVERTON from selling, assigning or transferring any right or interest they might have in any real property, options rights or permits which are subject to an agreement dated September 4, 1987 (hereafter referred to as "Agreement"). The Plaintiff has heretofore entered a notice of dismissal as to Transcontinental Corporation. (A copy of that notice is attached hereto as Exhibit "A".) The Defendant PACIFIC MALIBU has alleged that it has a possible and pending

sale of the real property, options rights or permits and has alleged that the Plaintiff's First Amended Complaint has interfered with that potential transaction. In order to avoid any hindrance of the proposed sale of real property, option rights or permits, the Plaintiff desires to further amend this complaint. (A copy of the proposed Second Amended Complaint is attached hereto as Exhibit "B".) Accordingly, the leave sought by Plaintiff should as the rule requires, be freely given.

For all of the foregoing reasons, Plaintiff respectfully requests that this Court grant its Motion to Amend Complaint.

DATED this 10th day of November, 1987.

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